(1)

91-368

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN THE MATTER OF THE ESTATE OF
LAURENCE T. BROWN, a Minor.

SHARON M. BROWN,

Petitioner,

vs.

GENE BROWN AND GLENDA BROWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH JUDICIAL DISTRICT

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(1a) QUESTIONS PRESENTED

1. Whether the Illinois statute, Chap. 110 1/2, par. 11-7, Ill.Rev.Stat., under which petitioner's child has been ordered placed in the custody of respondents (petitioner's father and his new wife), is unconstitutional, for any or all of the following reasons:

> A. On its face, is the statute unconstitutional, in violation of due process of law and/or equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution, because it authorizes a court to deprive a parent of custody of his or her child (on the basis of "best interest" of the child), even if the parent is "fit," only where both parents are living and not living together, while if the parents live together, or if one parent is dead, a parent cannot be deprived of custody unless the parent is "unfit"?

B. As (mis)construed and (mis)applied by the Appellate Court, is the statute unconstitutional as depriving petitioner of a liberty interest protected by the due process clause of the Fourteenth Amendment, in that it deprives petitioner of parental rights--that is, the mother's fundamental, constitutional right to the custody and care of her child --absent a finding that she is an unfit parent,[1] and absent any showing of any compelling State interest justifying interference with such fundamental right? It permits a mother, who is a fit parent, to have her child taken from her to be raised by her father and step-mother, because the mother is a practicing lesbian and because her father is economically more secure.

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1. The trial court (Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois) expressly declined to find that petitioner was "unfit," but, rather, recognized that "the issue in this case is not whether Sharon (petitioner) is unfit." (App. 25-26)

2. Whether the Appellate Court's affirmance improperly is based upon a strained misreading of the statute in order to avoid squarely ruling on the federal constitutional issues just delineated, in violation of principles set out in NAACP v. Alabama, 377 U.S. 288, 293-302.

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Sharon Brown, was the respondent in the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, appellant in the Appellate Court of Illinois, Fourth Judicial District, and petitioner in the Petition for Leave to Appeal filed in the Supreme Court of Illinois.

Respondents, Gene Brown and Glenda Brown, were petitioners in the Circuit Court, appellees in the Appellate Court, and respondents in the Supreme Court of Illinois.

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Appendices:

(1d) Judgment Below

The Opinion of the Appellate Court of Illinois, Fourth District, No. 4-89-0393, decided December 31, 1990, affirming the judgment of the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, granting guardianship of Laurence T. Brown, a Minor, to petitioners-appellees [here, respondents] and visitation rights to respondent-appellant [here, petitioner], is attached as Appendix A to this Petition. It is reported as Matter of Estate of Brown, 207 Ill.App.3d 139, 565 N.E.2d 312, 152 Ill.Dec. 70.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH JUDICIAL DISTRICT

Petitioner, Sharon M. Brown (hereafter, petitioner, or Sharon), the biological mother of the minor, Laurence T. Brown, prays that a writ of certiorari issue to review the judgment of the

Appellate Court of Illinois, Fourth Judicial District, affirming the order of the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, granting guardianship of the minor to respondents, leave to appeal having been denied by the Supreme Court of Illinois.

Judgment, Opinion and Orders Below

The Opinion of the Appellate Court of Illinois, Fourth Judicial District, affirming the Circuit Court's judgment, is set out as App. A. It is reported at 207 Ill.App.3d 139, 565 N.E.2d 312, 152 Ill.Dec. 70.

The Order of the said Appellate Court, denying Petition for Rehearing, dated January 30, 1991, is attached as App. B.

The Order of the Supreme Court of Illinois, No. 71579, denying Petition for Leave to Appeal, dated June 5, 1991, is attached as App. C.

The Memorandum Decision (Judgment) of the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, entered on December 5, 1988, is attached as App. D.

(1e) Jurisdictional Statement

On December 31, 1990, the Appellate Court of Illinois, Fourth Judicial District, filed its Opinion affirming the judgment of the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois. (App. A) A Petition for Rehearing, timely filed, was denied on January 30, 1991. (App. B) Petitioner's Petition for Leave to Appeal, timely

filed, was denied by the Supreme Court of Illinois on June 5, 1991. (App. C)

This Petition for Certiorari is timely filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

Petitioner maintains that her rights under the following provisions of the Fourteenth Amendment to the United States Constitution were violated by the Illinois courts' application of the statute at issue:

AMENDMENT XIV

> "Sec. 1. Citizenship rights not to be abridged by states
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

> reside. No State ... shall deprive any person of ... liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statute Involved

Petitioner maintains that the following statute, on its face and/or as applied, violates her federal constitutional rights as argued in this Petition:

> "If both parents of a minor are living and are competent to transact their own business and are fit parents, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person."

Chap. 110 1/2, par. 11-7, Illinois Revised Statutes 1985.

STATEMENT OF THE CASE

As the Opinion of the Appellate Court states:

> "This action involves an intrafamilial dispute over the guardianship of a minor child. (Ill.Rev.Stat. 1985, ch. 110 1/2, par. 11-7.)" In the Matter of the Estate of Laurence T. Brown, [hereafter, Brown], 207 Ill.App.3d 139, 565 N.E.2d 312, 313, 152 Ill.Dec. 70, 71 (4 Dist. 1990).

Pursuant to the statute here at issue --Ill.Rev.Stat. 1985, chap. 110 1/2, par. 11-7--respondents, the maternal grandfather of the minor (that is, petitioner's father) and his new wife (petitioner's step-mother) sought guardianship of the minor. While the petition initially alleged that Sharon was an unfit parent on the basis that she

was a practicing lesbian, after discovery progressed and after a home study of Sharon,[2] the pleadings were amended, asserting that even if Sharon was not unfit, respondents should have custody because it would be "in the best interest" of the minor.

Sharon was a single parent, having chosen to bear the child she conceived via rape. The biological father did not remain in the picture.

Sharon left her baby with her father and step-mother, for temporary care, while she successfully underwent treatment in a drug rehabilitation

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2. The home study, which concluded Sharon was fit and could provide a proper home for Laurence, was conducted by LaNell Hill, a supervising social worker with Lutheran Children and Family Services of Illinois, with over 20 years experience in evaluating adoptive and foster care homes.

program. Two months later--although Sharon was then making all necessary arrangements to provide a home for herself and the child, including securing an apartment and employment--respondents filed the petition which resulted in the present litigation. The trial court ruled that it was in the best interest of the child to be in the custody of Sharon's father because she was a practicing lesbian and the father is economically more secure.

RAISING THE FEDERAL QUESTION

In the trial court, in the Appellate Court of Illinois, and in the Petition for Leave to Appeal to the Supreme Court of Illinois, Sharon asserted that the statute on its face and as applied, violates her federally guaranteed constitutional due process right to raise her child, absent a finding that she is "unfit"; and that the statute, on its face and as applied, violates equal protection of the laws and due process of law under the Fourteenth Amendment to the United States Constitution. The Circuit Court and the Appellate Court both ruled that the statute is constitutional, and was not unconstitutionally applied. (App. 5-12; App. 50) The Supreme Court of Illinois denied discretionary review. (App. 23)

In the Supreme Court of Illinois, Sharon further asserted that the Appellate Court's manner of resolution of the constitutional issue, via purported reliance on an independent non-federal ground so as to avoid following precedent of the United States Supreme Court, further violated her due process rights. The Supreme Court of Illinois denied leave to appeal without opinion. (App. 23)

REASONS FOR GRANTING CERTIORARI

Summary of Argument[3]

This Court should scrutinize the Illinois courts' mangling of the rights of a natural mother, not found unfit, to guardianship, custody and care of her minor child.

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3. We feel constrained to point out that it appears this Court is uniformly disinclined to exercise discretionary review via certiorari of judgments rendered by the intermediate appellate courts of the States. Conside ing the rarity of the highest court of review of Illinois (i.e., the Supreme Court of Illinois) granting discretionary leave to appeal, a disproportionate number of litigants (at least in Illinois) are left with no recourse, as a practical matter, from the intermediate courts of review. We urge Your Honors to realize that for almost all Illinois litigants, the various Appellate Courts of Illinois, are indeed, the courts of last resort at the State level, and therefore to keep open the collective judicial mind to the merits of the instant Petition and the need for this Court to speak on the matters raised herein.

Absent a finding of the mother's unfitness, or of any superior interest of the State, the courts of Illinois have awarded the minor child to the maternal grandfather and his new wife, pursuant to a statutory provision which, on its face and/or as applied, operates to deprive Sharon of her fundamental parental rights as guaranteed by due process of law, and in a manner violative of equal protection of the laws.

Sharon Brown, who has been found by the trial court not to be an unfit mother, had her child taken away from her because she left the child with her father and his new wife (who cannot have a child) for a few months after the child's birth while she went through a drug rehabilitation program, and under Ill.Rev.Stat. 1985, Chap. 110 1/2, Par.

11-7, it has been determined that the child's grandfather and his wife can provide a better home for the child. The court's action was based upon Sharon being a practicing lesbian (App. 38-47), and her father being economically better able to provide for the child. (App. 47)

This action of the trial court is unconstitutional because (a) as a fit parent, Sharon has a constitutionally protected right to raise her own child, and placing the child with his grandfather violates Sharon's due process rights, and (b) the statute, Chap. 110 1/2, Par. 11-7, is unconstitutional because it permits placing the child with someone other than the parent for "good cause" without proving the parent's unfitness, only in the category where both parents are alive, but living apart,

whereas otherwise the statute requires a finding of parental unfitness. Additionally, it is unconstitutional to deprive a fit parent of custody of her child merely because some believe it is better for the child not to be raised by a practicing lesbian, who has a stable, but low paying job, where the alternative is a foster parent (grandfather, with a greater income).

The Appellate Court's avoidance of the constitutional infirmity of the statute--by holding that to find that it is not in the best interest of the child to remain with the parent necessarily requires a finding of "unfitness" and then by relying on the action of the trial court, which expressly declined to find Sharon unfit--must be rejected as totally irrational and in violation of due

process, where the trial court, having the opportunity to find Sharon unfit, specifically refused to do so and instead applied a different standard of "good cause" or "best interest."

ARGUMENT

1. The Illinois statute under which petitioner has been deprived of custody of her minor child, even though petitioner was not found "unfit," and under which the said child was placed with petitioner's father and his new wife (respondents), is unconstitutional in violation of the due process and equal protection clauses.

Prefatory Statement: The Fundamental Constitutional Parental Rights Involved

Central to all aspects of the arguments made in this Petition, is the paramount interest of a biological parent in the right to bring up his or her child (absent, of course, some overriding State interest to the contrary). This paramount interest finds genesis and protection in the Constitution of the United States, via judicial interpretation of the due process clause of the Fourteenth Amendment. Before proceeding to demonstrate in the specific arguments

that follow how the State of Illinois has violated this fundamental, due process, parental right of Sharon Brown, petitioner, we first set out the constitutional basis of this Petition.

This Court repeatedly has recognized and given substance and meaning to the fundamental right of a person to raise one's own children. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley, id. at 651, as quoted in Brown, supra, 565 N.E.2d at 314, 152 Ill.Dec. at 72:

> "'The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska [(1923)], 262 U.S. 390, 399, "basic civil rights of man," Skinner v. Oklahoma [(1942)], 316 U.S. 535, 541, and "[r]ights far more precious *** than property rights," May v. Anderson [(1953)], 345 U.S. 528, 533. "It is cardinal with us that the custody, care and

> nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts [(1944)], 321 U.S. 158, 166.'"

Dating back to their earliest recognition in Meyer v. Nebraska, supra, and Pierce v. Society of Sisters, 268 U.S. 510 (1925), this Court has nurtured and protected such fundamental familial rights. Concurring in Griswold v. Connecticut, 381 U.S. 479 (1965), Mr. Justice White commented:

> "... liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children.'" Id. at 502.

There exists a "private realm of family life that the state cannot enter" without some compelling justification. Prince v. Massachusetts, 321 U.S. 158, 166 (1944);

see also, The Constitution and the Family, 93 Harv. L.Rev. 1156, 1350-51 (1980).

Freedom of choice in family matters has long been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. See Wisconsin v. Yoder, supra; Meyer v. Nebraska, supra. The Supreme Court has consistently afforded families substantial protection from State intrusion into their private affairs. Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra; Prince v. Massachusetts, supra; Stanley v. Illinois, supra; Moore v. City of East Cleveland, 431 U.S. 494 (1977). This includes a parent's right to the care, custody and control of his or her child, which, as a fundamental right, must not

be interfered with, absent "a powerful countervailing interest." Stanley v. Illinois, supra, at 651.

It is precisely this right, which petitioner claims has been violated by the statute in question, facially and/or as applied by the Illinois courts.

A. The Illinois statute, Chap. 110 1/2, Par. 11-7, Ill.Rev.Stat. 1985, under which Sharon's child has been ordered placed in the guardianship and custody of respondents (Sharon's father and his new wife), is unconstitutional, because it deprives Sharon of her parental due process right, by way of an unreasonable classification in violation of equal protection of the laws.

Chapter 110 1/2, Paragraph 11-7 permits a minor child to be given to a person other than a parent without a finding that the parent is unfit, only in the situation where both parents are alive and living apart. Under the statute, if both parents are living,

competent to transact their own business, and living together, and if both are fit persons, they are entitled to custody, even if it would be in the best interest of the child for custody to be in some other person. Similarly, under the statute, if one parent is dead and the surviving parent is competent and fit, he or she has the absolute right to custody.

This statute sets up an invalid classification. It treats parents living apart differently from parents living together and from a sole surviving parent. This classification is unconstitutional. There is no rational basis to treat custody rights of a parent who is living apart from the other parent differently from those of parents who are living together, or of a sole surviving parent. Classifications which have no

rational basis, violate the Fourteenth Amendment guarantee of equal protection of the laws. Stanley v. Illinois, 405 U.S. 645 (1972); Plyler v. Doe, 457 U.S. 202, 216 (1982).

When a fundamental right is at stake, as here, the usual deference afforded to the legislature disappears, and courts apply heightened scrutiny to the legislature's classification. See Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). When a court applies the standard of strict scrutiny, it goes beyond looking for mere rationality in State legislation. Instead, the court must determine whether the statute furthers a compelling State interest, and whether the statute is necessary to accomplish that goal. See Bates v. Little Rock, 361 U.S. 516 (1960);

McLaughlin v. Florida, 379 U.S. 184 (1964).

A statute, as here, that results in the most intrusive State action imaginable--that of depriving a parent of her natural child--requires the strictest scrutiny. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Cf. Zablocki v. Redhail, 434 U.S. 374 (1978).

States have no compelling interest to require a finding of unfitness for one class of parents and not another. Compare, cf. Stanley v. Illinois, supra.

Requiring a finding of unfitness for one class of parents while not requiring such finding for another class, violates equal protection of the laws. There is no rational basis for treating parents differently depending on whether one or both parents is alive. The

classification in the challenged statute is arbitrary and serves no reasonable State purpose. Dandridge v. Williams, 397 U.S. 471 (1970).

Sharon has had no contact with her child's father since the rape. Her son has had no contact with his father. The father pays no child support, and he is neither seeking custody nor contesting Sharon's sole custody of Laurence. To deprive Sharon of her fundamental right to her son simply because the father of the child, a rapist, happens to be alive, is a clear violation of the Equal Protection Clause.

Under this statute, if this rapist were dead, the court would be required to return the child to Sharon, because she is not an unfit parent. To deprive her of her parental rights because the father

is alive, though she has not been found unfit, simply is so irrational as to violate due process, as well as equal protection of the laws.

B. Even if not facially unconstitutional, the statute as (mis)construed and (mis)applied by the Appellate Court, unconstitutionally deprives Sharon of her fundamental, parental due process right, (i) without finding that she is an unfit parent, and (ii) without showing any compelling State interest justifying interference with such right. It permits a mother, who is a fit parent, to have her child taken from her to be raised by her father and step-mother because the mother is a practicing lesbian and because the father is economically more secure.

The court's bases, i.e., Sharon being a practicing lesbian, and that the father is more economically secure, are constitutionally insufficient to deprive her of her child.

Here, although the Circuit Court (which heard and considered all the

evidence), expressly declined to make any finding that Sharon was unfit, and specifically held that "the issue in this case is not whether Sharon is unfit," (App. 25-26), the court nonetheless awarded guardianship and custody of the minor child to respondents because Sharon was a lesbian and the father was economically better able to support the child. (App. 36-47)

The State has not shown that compelling interest which is prerequisite to interference with a fundamental right.

The State may not intervene in family life absent a compelling State interest to do so. Prince v. Massachusetts, supra, as when the parent has abused or neglected the child. No circumstances were presented below that would warrant the State's removing this child from his mother.

Unfitness, abuse or neglect was not shown. All that was demonstrated is that a recovered addict, who has controlled diabetes and works at a low paying job, was a practicing lesbian,[4] and that her father had an economically more secure home.

There is not a sufficient basis for depriving Sharon of her child.

The State of Illinois' determination that a child can be removed from a parent and given to a non-parent based upon the parent's homosexuality, is an opinion so contrary to other authority as to be irrational and constitutionally invalid. It violates due process.

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4. Sharon had committed a three year relationship with a responsible partner; she was not acting promiscuously. She and her partner (who is well-employed) share a house, where the home-study was done.

Modern acceptability of homosexual activity and more recent decisions demonstrate that homosexuality of a parent is an invalid basis for taking a child from a parent and giving the child to a non-parent.

In S.N.E. v. R.L.B., 699 P.2d 875, the Supreme Court of Alaska considered a custody dispute between a father and lesbian mother. The father maintained that his case did not involve sexual preference discrimination issues (much as respondents in the case at bar have stated that this is not a case about gay rights). The court disagreed, stating, "in marked contrast to the wealth of testimony that Mother is a lesbian, there is no suggestion that this has or is likely to affect the child adversely." In a footnote, the court mentioned, "the

superior court found that this relationship might be less stable and longlasting than Father's most recent marriage. However, this was essentially conjecture by the court, since there was no evidence Mother's relationship was not committed. Instead, the court relied on its own unsupported opinion that homosexual relationships are unstable and usually of short duration."

The Alaska court went on to say, "Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian." Id. at 879.

In In the Matter of the Marriage of Cabalquinto, (1983) 669 P.2d 886, the Supreme Court of Washington, sitting en banc, considering a visitation issue between the mother and the non-custodial,

gay father, clarified the rule of law initially set out in Schuster v. Schuster (1978) 585 P.2d 130, that "homosexuality in and of itself is not a bar to custody". The court also pointed out that custody and visitation privileges are not to be used to penalize or reward parents for their conduct.

The Superior Court of New Jersey in M.P. v. S.P. (1979) 404 A.2d 1256, considered the change of custody from the divorced lesbian mother to the natural father. In leaving custody with this admitted practicing homosexual, the court considered the community disapproval of the mother, and said:

> "Plaintiff's argument overlooks, too, the fact that the children's exposure to embarrassment is not dependent upon the identity of the parent with whom they happen to reside. Their discomfiture, if any, comes about not because of

living with defendant, but because she is their mother, because she is a lesbian, and because the community will not accept her. Neither the prejudices of the small community in which they live nor the curiosity of their peers about defendant's sexual nature will be abated by a change of custody. Hard facts must be faced. These are matters which courts cannot control, and there is little to gain by creating an artificial world where the children may dream that life is different than it is.

If defendant retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently

popular sentiment or prejudice." Id. at 1262-63.

The case most nearly on point with the case at bar is a probate case decided by the Supreme Judicial Court of Massachusetts in 1980. In that case, the natural mother, a lesbian, living in an active practicing homosexual relationship, and who had in her past suffered a variety of physical and emotional illnesses, had voluntarily placed her children with an unrelated third party. Massachusetts, like Illinois, favors the natural family. The court, quoting Custody of a Minor, ___ Mass. ___, 389 N.E.2d 68, 73 (1979), said, "it is a fundamental principle that the Commonwealth may not attempt to force the breakup of a natural family without an affirmative showing of parental unfitness." Bezio v. Patenaude,

(1980) ___ Mass. ___, 410 N.E.2d 1207, 1211. In Bezio, there was substantial expert testimony by Dr. Alexandra Kaplan, a clinical psychologist and professor of psychology at the University of Massachusetts, who testified, "(t)here is no evidence at all that sexual preference of adults in the home has any detrimental impact on children...(M)any other issues influence child rearing. Sexual preference per se is typically not one of them...(M)ost children raised in homosexual situation become heterosexual as adults...There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, maladjusted than children raised with a loving couple of mixed sex. (Sexual orientation of the

parent) is irrelevant to (the child's) mental health." Id. at 1215-16.

The court remanded the case, holding that "a finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children simply because their households fail to meet the ideals approved by the community ... (or) simply because the parents embrace ideologies or pursue life-styles at odds with the average." Id. at 1216.

All unbiased and credible psychiatric testimony demonstrates that Sharon's sexual orientation will not have an adverse effect on her son. Dr. Thomas E. Radecki was a court-appointed psychiatrist, not a "hired gun". He was

selected by the respondents, Gene and Glenda Brown. With no ax to grind, he performed an honest evaluation of Sharon. He reviewed relevant scientific studies regarding the effect on a child of being brought up by a homosexual mother, and he considered Sharon's prior drug and alcohol abuse and present diabetic condition. He also considered the issue of bonding. His testimony totally supports that it would be in the best interest of the child for parenting to be done by Sharon Brown.

Dr. Radecki testified consistent with his Report. There, he stated:

> "After a thorough psychiatric evaluation it was apparent that the patient has a strong maternal attachment to raise her own child. She appears quite able to do so. She has been apparently quite stable over the past one and a half years. Psychiatric research on children raised by lesbian mothers show

that they do as well as those raised by heterosexual mothers. In my best psychiatric opinion, I think that Sharon Brown would be able to provide a very good home for her child and would likely do a quite good to very good job of raising her own child. Patient appears to have been very cooperative and sincere at conquering her cocaine problem with treatment one and a half years ago. I think that she would be able to provide a stable and positive environment for her child at the present time and in the future.

I also see no reason to think that her diabetic problems would in any way interfere with the patient providing a positive and healthy environment for the raising of her child.

The patient's active continuation in Narcotics Anonymous and counseling for substance abuse problems from the past is a positive sign of her stability and should be considered favorably in the determination of the likelihood of providing a positive parenting environment."

Sharon's homosexual relationship with Jill Lewandowski is not a casual

situation. At the time of the testimony, they had been living together in a committed relationship for more than two years. This relationship was maintained, despite the added strain of Sharon's involvement in the custody litigation, which required frequent trips to Decatur. Her partner's commitment is self-evident by her willingness to make herself and her home subject to investigation, and by her testimony before the court. This is more than some partners in heterosexual marriages might be willing to do, to assist their partner in getting the custody of a child not their own.

Dr. Radecki testified that it is not more likely that one would grow up as a homosexual if raised by a homosexual parent than if raised by a heterosexual

parent. He testified there is no risk of contracting Aids from being raised by a lesbian mother.

Here, without showing any basis for finding harm will come to the child by being raised by his mother, the child has been taken away on a dubious "best interest standard". As applied here, that violates a parent's right to raise her child.

In Parham v. J.R., 442 U.S. 584, 602 (1979), the Supreme Court examined the parental right to make decisions concerning the mental health of the child, noting:

> "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere

> creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); other citations omitted.) .... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190."

Thus, the law presumes that absent a finding of unfitness, the natural parent is in a better position than the State to determine the best interests of the child. For this reason both the Juvenile Court Act (Ill. Rev. Stat. 1977, ch. 37, par. 705.9(3)) and the Adoption Act (Ill. Rev. Stat. 1977, ch. 40, pars. 1501 et.

seq.) require a finding of unfitness before the State can remove the child from the parent's custody.

Although the instant cause was designated a proceeding in guardianship under the Probate Act, the State here essentially conducted what amounts to a parental termination hearing. The result was precisely the same: the State permanently deprived a natural parent of the care and custody of her child.

Due process requires that if statutes or regulations infringe upon a constitutionally protected right, it must be shown that they reasonably and effectively carry out their goals. The State must show that it has employed the least restrictive means to effect its stated end. Pierce v. Society of Sisters, supra. In Moore v. City of East

Cleveland, 431 U.S. 494, 499 (1977), the Court held that when the government intrudes on choices concerning family, the Court must examine the importance of the governmental interests advanced and the extent to which they are served by the challenged regulations.

The statute here challenged, as interpreted by the Circuit Court and the Appellate Court, is counterproductive to the best interests of Laurence Brown, because it takes him away from a fit, natural parent. It is clearly in the child's best interest that the family unit be maintained. As was stated in Stanley v. Illinois, supra: "[T]he state registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if [the parent is fit] the state spites its

articulated goals when it needlessly separates [the child] from his family." Id. at 652-53. (Emphasis added.) While the State undeniably has a strong interest in protecting the best interests of children in order to promote a stable society, this interest has no meaning if the family unit is not also preserved and respected.

In this case, due process has been denied when, without a finding of her unfitness, Laurence is taken from his mother, Sharon.

2. The Appellate Court's affirmance improperly is based upon a strained misreading of the statute in order to avoid squarely ruling on the federal constitutional issues raised by Sharon, in violation of principles set out in NAACP v. Alabama, 377 U.S. 288, 293-302.

In violation of this Court's precepts that a state court may not avoid a constitutional ruling by relying on a so-called independent non-federal ground which appears to have been created by the state reviewing court just for purposes of that case, see NAACP v. Alabama, 377 U.S. 288, 293-302 (1964), here, the Appellate Court avoided the crucial constitutional issue simply by so interpreting the challenged statute as to hold that even though the Circuit Court expressly failed to find Sharon unfit, the statute implicitly requires such finding in all cases removing a minor

child from parental custody. (App. 9-10; Brown, supra, 565 N.E.2d at 315.)

The unprecedented holding that placing the child with a non-parent under the "best interest" standard of the statute also requires a finding of unfitness--though the statute expressly provides otherwise--is simply a "gimmick" adopted by the Appellate Court to avoid the inexorable equal protection challenge.

In effect, the Appellate Court retroactively has rewritten the statute, without rational basis, and then proceeded to decide the case on the basis of the rewritten statute--although the Circuit Court, which heard the evidence, expressly refused to find Sharon unfit.

Because the Circuit Court expressly refused to find Sharon unfit, it is absurd for the Appellate Court to uphold

the constitutionality of the statute on grounds that the trial court must find unfitness in all instances to remove a child from parental custody under the Act.

The Appellate Court's creation of a previously non-existent State ground in order to avoid a constitutional determination, itself is unconstitutional, and violates precepts of this Court prohibiting the artificial creation of a "non-federal ground" for avoidance of a decision holding a statute runs afoul of the federal Constitution. See NAACP v. Alabama, supra, at 297.

CONCLUSION

This Court should be concerned that the most fundamental, constitutional rights of a natural parent, have been stripped away from petitioner by the State.

The disturbing conclusion of the Appellate Court of Illinois, allowing a child to be taken from a parent not found unfit, absent any showing of compelling State interest, reached via rewriting a statute so as to avoid a clear-cut, facial equal protection challenge, should be scrutinized by this Court. We submit that Sharon's situation is just the tip of the proverbial iceberg, and shudder at the thought how easy it is, in Illinois, for a child to be taken from its parent, though there be no finding the parent is unfit.

For any or all of the reasons advanced in this Petition, certiorari should be allowed.

And, on the merits, this Court should hold the statute unconstitutional, and remand with appropriate directions.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

FILED
DEC. 31, 1990
Clerk Of The
Appellate Court, 4th Dist.

NO. 4-89-0393
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In the Matter of the Estate of Laurence T. Brown, a Minor, GENE BROWN and GLENDA BROWN, Petitioners-Appellees, v. SHARON M. BROWN, Respondent-Appellant.	) Appeal from) Circuit Court) of Macon County) No. 86P291)) Honorable) Warren A.) Sappington,) Judge Presiding.

JUSTICE KNECHT delivered the opinion of the court:

This action involves an intrafamilial dispute over the guardianship of a minor child. (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 11-7.) The petitioners, Gene and Glenda Brown, are the maternal grandfather of the minor child and his wife. The respondent, Sharon M. Brown, is the natural mother of the minor child. Petitioners were named co-

guardians by the circuit court of Macon County, and respondent appeals. We affirm.

On July 30, 1986, the petitioners filed a petition for guardianship over the minor child in the circuit court of Macon County, Illinois. The petition, as later amended, alternately alleged: (1) the respondent was unfit as a parent to have custody of the minor child; (2) the petitioners were fit persons to have custody of the minor child; and (3) it would be in the best interest of that child to appoint the petitioners as his legal guardians for custody purposes. (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 11-7.) On December 5, 1988, the circuit court entered a memorandum decision awarding child custody to the petitioners and visitation rights to the respondent. On January 12, 1989, the respondent filed a motion for

reconsideration of the memorandum decision. On March 7, 1989, the circuit court entered an order appointing the petitioners as co-guardians over the minor child. On March 27, 1989, the respondent filed her notice of appeal in the action.

The respondent raises three issues on appeal: (1) whether the guardianship provision of the Probate Act of 1975 (Act) is unconstitutional (Ill. Rev. Stat. 1987, ch. 110 1/2, par. 11-7); (2) whether the petitioners lack standing to initiate the proceeding for guardianship over the minor child (Ill. Rev. Stat. 1987, ch. 40, par. 601(b)(2)); and (3) whether the appointment of the petitioners as co-guardians over the minor child is against the manifest weight of the evidence.

We first address the merits of a procedural motion taken with this action

on appeal. The petitioners contend the brief filed by the respondent is not in compliance with the procedural practice rules governing appeals. (See 107 Ill. 2d Rules 323, 326, 341, 342.) Petitioners request both the brief be stricken and the appeal be dismissed as sanctions for failure to comply with these rules.

The procedural practice rules have the force of law in Illinois. (Portock v. Freeman (1977), 53 Ill. App. 3d 1027, 1031, 369 N.E.2d 201, 204.) Litigants must comply with these rules in filing their briefs on appeal. Absent substantial compliance with the procedural practice rules, we may, in the proper exercise of discretion, sanction that litigant by striking the brief and dismissing the appeal. Mead v. Board of Review (1986), 143 Ill. App. 3d 1088, 1092, 494 N.E.2d 171, 174-75.

We have examined the brief of the respondent in light of the procedural challenge. The brief of the respondent does not so flagrantly violate the cited practice rules as to preclude review of the cause on appeal. "[W]here none of the purported violations of [the procedural practice rules] are so flagrant as to hinder or preclude review, then either the striking of a brief or the dismissal of an appeal is *** unwarranted." (In re Marriage of Betts (1987), 155 Ill. App. 3d 85, 91, 507 N.E.2d 912, 916.) Accordingly, we deny the motion of the petitioners.

The respondent initially contends the guardianship provision of the Act is unconstitutional. (Ill. Rev. Stat. 1987, ch. 110 1/2, par. 11-7.) We disagree.

As a historical matter, the United States Supreme Court has accorded great deference to the relationship between

parent and child in its decisions. (Parham v. J.R. (1979), 442 U.S 584, 602, 61 L. Ed. 2d 101, 118, 99 S. Ct. 2493, 2504.) A summary of that decisional course offers enlightening commentary on familial relations:

> "The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska [(1923)], 262 U.S. 390, 399[, 67 L. Ed. 1042, 1045, 43 S. Ct. 625, 626], 'basic civil rights of man,' Skinner v. Oklahoma [(1942)], 316 U.S. 535, 541[, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110, 1113], and '[r]ights far more precious *** than property rights,' May v. Anderson [(1953)], 345 U.S. 528, 533[, 97 L. Ed. 1221, 1226, 73 S. Ct. 840, 843]. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts [(1944)], 321 U.S. 158, 166[, 88 L. Ed. 645, 652, 64 S. Ct. 438, 442]." Stanley v. Illinois (1972), 405 U.S. 645, 651, 31 L. Ed. 2d 551, 558-59, 92 S. Ct. 1208, 1212-13.

Illinois law, in accordance with these

decisions, defers in the first instance to the relationship between parent and child in both custody and guardianship proceedings. (People ex rel. Edwards v. Livingston (1969), 42 Ill. 2d 201, 247 N.E.2d 417; In re Custody of Townsend (1981), 86 Ill. 2d 502, 427 N.E.2d 1231.) That law, as expressed in the Act, provides:

> "If both parents of a minor are living and are competent to transact their own business and are fit parents, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person." Ill. Rev. Stat. 1987, ch. 110 1/2, par. 11-7.

This section represents a codification of the long-standing superior rights

doctrine. (Livingston, 42 Ill. 2d at 209-10, 247 N.E.2d at 422; see also In re Person and Estate of Newsome (1988), 173 Ill. App. 3d 376, 379, 527 N.E.2d 524, 525.) Under that doctrine, a natural parent is presumed to have a superior right to the care, control, and custody of minor children. The superior rights doctrine is not absolute. A natural parent may be required to yield custody rights if the best interests of a minor child will be served. Livingston, 42 Ill. 2d at 208-10, 247 N.E.2d at 421-22; Townsend, 86 Ill. 2d at 508-09, 427 N.E.2d at 1234-35.

The equal protection challenge is not persuasive. (See Montgomery v. Roudez (1987), 156 Ill. App. 3d 262, 269-70, 509 N.E.2d 499, 504-05.) Respondent contends the statute sets up an unreasonable and discriminatory classification so that parents who live apart are treated

differently than parents who live together. We do not view the statute in this light.

Respondent claims that this discriminatory classification arises because, under section 11-7 of the Act, a child may be removed from parents who live together or from a surviving parent only after a finding that such parent is not a "fit person," whereas if the parents live apart, no such finding is required. In Townsend, however, the supreme court construed that section as requiring a third party seeking to obtain custody of a child to "demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody and further [to] show that it is in the child's best interests that the third party be awarded the care, custody and control of the minor." (Townsend, 86 Ill. 2d at 510-11, 427

N.E.2d at 1235-36.) The phrase, to "demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody" is legally equivalent to requiring a demonstration that a parent is not "fit." Thus, as so construed, all parents under section 11-7 of the Act must be shown to be not fit. (We note parenthetically that the parent of whom the supreme court was speaking in Townsend was the father who was living apart from the mother, thus making clear the application of the language quoted from Townsend to parents described in the last sentence of section 11-7.)

In light of this statutory interpretation, the respondent cannot establish any disparity in the treatment of litigant parents in guardianship proceedings. (Helvey v. Rednour (1980), 86 Ill. App. 3d 154, 158-59, 408 N.E.2d

17, 21.) That interpretation subordinates the operation of the superior rights doctrine within the context of the best interest standard. Livingston, 42 Ill. 2d at 208-10, 247 N.E.2d at 421-22; Townsend, 86 Ill. 2d at 508-09, 427 N.E.2d at 1234-35.

The due process challenge of the respondent also fails. (See Montgomery, 156 Ill. App. 3d at 269, 509 N.E.2d at 504.) The respondent was accorded her full evidentiary rights at a fair hearing on the guardianship petition. (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 11-10.1.) The statute permits the court to award custody to either parent or a third party only if a good reason is demonstrated, and it is in the best interests of the child. Thus, petitioners first had to meet a limited standing requirement, which we will discuss below, to go forward on the petition. Then, the

petitioners were required to prove a good reason existed for the award of custody to some person other than respondent. They did so here by showing respondent had serious parental deficiencies relating to health, finances, and stability. While the trial court did not specifically find neglect on her part, it is clear from the findings she neglected her son by near abandonment, by abusing her body with drugs and alcohol while pregnant, and by not providing a stable home for him. Then, petitioners proved to the trial court's satisfaction it was in the child's best interests custody be awarded to them. We conclude this framework accorded due process to respondent.

After carefully weighing the evidence on the welfare of the minor child, the circuit court entered an order awarding custody to the petitioners and visitation

to the respondent. Contrary to her contention, the respondent has not suffered a total deprivation of her parental rights under this order. The respondent is free to develop and foster her familial relationship with the minor child in the hopeful expectation of terminating guardianship. (See In re Estate of Becton (1985), 130 Ill. App. 3d 763, 773-74, 474 N.E.2d 1318, 1326.) While there are no specific review procedures under the Act, the respondent, who now has visitation rights, might well in the future seek expanded visitation and a return of custody to her. The guardianship order did not terminate her parental rights or permanently bar her from ever being her son's custodian or guardian.

The respondent next contends the petitioners lack standing to initiate a proceeding for guardianship over the

minor child. (Ill. Rev. Stat. 1985, ch. 40, par. 601(b)(2).) We find no merit in this contention. See In re Custody of McCarthy (1987), 157 Ill. App. 3d 377, 380-81, 510 N.E.2d 555, 556-57.

A review of the record indicates the respondent failed to raise any argument on standing in the circuit court. Arguments not raised in the circuit court are deemed to have been waived on appeal. See Greer v. Illinois Housing Development Authority (1988), 122 Ill. 2d 462, 508, 524 N.E.2d 561, 582.

Were we to address the standing of the petitioners to initiate this guardianship proceeding, we would find standing exists.

As a jurisdictional matter, the petitioners had to satisfy a limited standing requirement to file their petition for guardianship over the minor child. (See Newsome, 173 Ill. App. 3d at

379, 527 N.E.2d at 525.) That requirement provides in pertinent part:

> "(b) A child custody proceeding is commenced in the court:
>
> * * *
>
> (2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in physical custody of one of his parents." (Emphasis added.) (Ill. Rev. Stat. 1985, ch. 40, par. 601(b)(2).)

The limited standing requirement thus protects both the custody rights of the natural parent and the environmental stability of the minor child. See In re Custody of Menconi (1983), 117 Ill. App. 3d 394, 396-97, 453 N.E.2d 835, 838; Ill. Rev. Stat. 1985, ch. 40, pars, 601, 602(a)(4), (a)(5).

There is no litmus test to determine standing. The determination depends on the particular facts of the individual guardianship action. (In re Marriage of

Carey (1989), 188 Ill. App. 3d 1040, 1047, 544 N.E.2d 1293, 1297.) The facts of obvious importance here concern the legal incidents of custody: (1) who has immediate physical possession of the minor child; (2) how that person took over control; and (3) the nature, manner, and duration of possession. (In re Marriage of Santa Cruz (1988), 172 Ill. App. 3d 775, 783, 527 N.E.2d 131, 136.) Accordingly, the standing requirement is satisfied when the petitioners depend on the voluntary, not fortuitous, relinquishment of child custody. See In re Custody of Peterson (1986), 112 Ill. 2d 48, 53-55, 491 N.E.2d 1150, 1152-53.

In this action, the respondent voluntarily relinquished some degree of control of the minor child to the petitioners. The respondent entered a rehabilitation program for substance abuse following the birth of the minor

child in late February 1986. She arranged for the petitioners to assume care, control, and custody of the minor child in that interim time period. The respondent then moved into the residence of the petitioners upon her release from the rehabilitation program in late March 1986. She left alone from that residence without explanation, remaining incommunicado, during the time period between mid-April and early June 1986. In July 1986 she signed a notarized document designed to grant petitioners permission to care for the child and to obtain medical or other care for him. The respondent reestablished contact through visitation on a somewhat sporadic basis. Under these circumstances, the respondent has defaulted on her parental responsibilities, leaving an integrated familial relationship between the minor child and the petitioners. See Menconi,

117 Ill. App. 3d at 398-99, 453 N.E.2d at 839.

The respondent last contends the appointment of the petitioners as co-guardians over the minor child is against the manifest weight of the evidence. We disagree.

The circuit court had the superior opportunity to determine custody in accordance with the best interests of the minor child. That appointment will not be disturbed unless contrary to the manifest weight of the evidence. Becton, 130 Ill. App. 3d at 769, 474 N.E.2d at 1323.

The best interest standard considers both the present and the prospective welfare of the minor child. Such consideration is not the simplest of matters. (Eaton v. Eaton (1977), 50 Ill. App. 3d 306, 313, 365 N.E.2d 647, 653; Ill. Rev. Stat. 1985, ch. 40, par.

602.) It requires a deep appreciation of the emotional impact that both custodial and guardianship determinations have on any familial relationship between litigants. See Smith v. Organization of Foster Families for Equality & Reform (1977), 431 U.S. 816, 833, 53 L. Ed. 2d 14, 28, 97 S. Ct. 2094, 2103.

On appeal, we must view the evidence in the light most favorable to the litigant prevailing below in the action. (Becton, 130 Ill. App. 3d at 770, 474 N.E.2d at 1324.) Applying this rule, we find the guardianship appointment is not contrary to the manifest weight of the evidence. As integrated familial relationship already exists between the minor child and the petitioners. They have sufficient resources to meet the reasonable needs of the minor child. It is a stable home with a wholesome environment. In

contrast, the respondent has yet to establish a meaningful familial relationship with the minor child. She is barely self-supporting in the aftermath of bankruptcy. Her parental life-style lacks any continuous pattern of stability. The record and the trial court's findings recount a myriad of problems which we need not recount that clearly support the guardianship order. Giving consideration to respondent's superior right as a natural parent as required by Townsend, the best interest standard still clearly requires the minor child remain in the custody of the petitioners. See Montgomery, 156 Ill. App. 3d at 267-68, 509 N.E.2d at 503-04.

The order of the Macon County circuit court as to guardianship over the minor child is affirmed.

Affirmed.

STEIGMANN and McCULLOUGH, JJ., concur.

APPENDIX B

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

Clerk of the Court
(217) 782-2586

Research Director
(217) 782-3528

DATE: 01/30/91

RE: In the Matter Estate of Laurence T. Brown, a Minor
General No. 4-89-0393
Macon 86P291

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:bt

TO: Frederick F. Cohn
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APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

71579

June 5, 1991

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

No. 71579 - In the Matter of the Estate of Laurance T. Brown, a Minor (Gene Brown et al., respondents, v. Sharon M. Brown, petitioner). Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1991.

APPENDIX D

November 30, 1988

Mr. Joseph W. Vigneri
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Chicago, Illinois 60606

In Re: 86-P-291 Laurence T. Brown, a Minor

Memorandum of Decision

The issue in this cause is whether it is in the best interest of Laurence T. Brown (hereinafter referred to as Larry) to be placed in the custody of the Petitioners, who are Larry's maternal grandfather and stepgrandmother (hereinafter referred to as Gene and Glenda) or the respondent, who is Larry's biological mother (hereinafter referred to as Sharon).

The Amended Petition for Appointment

of Guardian was filed herein on May 28, 1987 under Section 11-7 of the Probate Act (Ill. Rev. Stat. 1985, Ch. 110 1/2, Par. 1-1 et seq.) which provides as follows:

> Parental rights to custody. If both parents of a minor are living and are competent to transact their own business and are fit parents, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person.

It is significant that this action was not commenced under either the Adoption Act (Ill. Rev. Stat. 1985, Ch. 40, Sec. 1501 et seq.) or the Juvenile Court Act (Ill. Rev. Stat. 1985, Ch. 37, Sec. 701-1 et seq.) both of which are predicated upon a finding of unfitness and a

termination of parental rights. Consequently, the issue in this case is not whether Sharon is unfit. Rather, this proceeding is analogous to a custody hearing under the Illinois Marriage and Dissolution Act (Ill. Rev. Stat. 1985, Ch. 40, Sec. 1-1 et seq.) which is, also, predicated upon a determination of the child's best interest. Illinois Supreme Court Justice Daniel P. Ward explicated "best interest" in the case entitled, In Re Custody of Townsend, 86 Ill.2d 502, October 21, 1981, as follows:

> In child-custody disputes it is an accepted presumption that the right or interest of a natural parent in the care, custody and control of a child is superior to the claim of a third person. The presumption is not absolute and serves only as one of several factors used by courts in resolving the ultimately controlling question of where the best interests of the child lie. (See People ex rel. Edwards v. Livingston (1969), 42 Ill.2d 201; Giacopelli v. Florence Crittenton Home (1959), 16 Ill.2d 556; Cormack v. Marshall

(1904), 211 Ill. 519, Halstead v. Halstead (1966), 259 Iowa 526, 144 N.W.2d 861; Annot., 45 A.L.R.3d 216 (1972); Annot., 31 A.L.R.3d 1187 (1970).) A court need not find that the natural parent is unfit or has forfeited his custodial rights before awarding custody to another person if the best interests of the child will be served. (People ex rel. Edwards v. Livingston (1969), 42 Ill.2d 201, 209; Soldner v. Soldner (1979), 69 Ill.App.3d 97.) This standard or "guiding star" (Nye v. Nye (1952), 411 Ill. 408, 415) is a simple one designed to accommodate the often complex and unique circumstances of a particular case. The superior-right doctrine or presumption in favor of the natural parent, however, need not always be applied automatically, in conjunction with the best-interests-of-the-child standard. (Page 508)

The right and correlative responsibility of a parent to care for his or her child is fundamental and as ancient as mankind. This basic human right and the superior-right doctrine find legislative expression in the Probate Act of 1975 (Ill. Rev. Stat. 1979, Ch. 110 1/2, par. 1-1 et seq.). (Page 509)

The Supreme Court has recognized the primacy of a natural parent's right to the custody of the child. In

Stanley v. Illinois (1972), 405 U.S. 645, 31 L.Ed. 2d 551, 92 S. Ct. 1208, ... the court observed:

"The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' Kovacs v. Cooper [(1949)], 336 U.S. 77, 95, 93 L. Ed. 513, 527, 69 S. Ct. 448, 458] (Frankfurter, J., concurring). (Pages 512, 513)

It is obvious that in a custody dispute a court should give weight to the claim of a third person who has had actual or legal custody of the child for a substantial period of time, especially if the evidence shows that the child has become an integral member of a true family unit. (See generally Halstead v. Halstead (1966), 259 Iowa 526, 144 N.W.2d 861; Look v. Look (1974), 21 Ill.App.3d 454.) But however important this factor may be in a given case, it does not rise to the leval of a presumption so as to "neutralize' the superior-right doctrine or transpose the

> superior right from the natural parent to the third person. It remains simply a factor to consider in ascertaining what will best serve the interests of the child. Of course, in a given case it may be the determining factor in the custody decision. (Page 515)

In the instant case, the Court finds that Sharon is 34 years old and that Larry is 2 1/2 years old, having been born in Chicago, Illinois, February 20, 1986. Further, Sharon's testimony that Larry was conceived when she was raped is unimpeached. There is no evidence that the rape was reported to the police, that Sharon filed a paternity suit against the putative father, that the putative father was notified of either the birth or this proceeding, or that Sharon ever requested assistance, monetary or otherwise, from the putative father. Moreover, Sharon refused to disclose the name of the putative father to the Guardian Ad Litem herein until she was ordered do to so on

May 14, 1987.

Furthermore, the Court finds that during her pregnancy, Sharon was addicted to both marijuana and cocaine and that the effect of the use of these drugs on Larry cannot now be determined because of Larry's tender years. In addition, Sharon testified that she was a diabetic and had cocaine in her blood when Larry was born.

Further, the Court finds that shortly after Larry's birth, Sharon called her mother in Decatur, who "made arrangements" for Gene and Glenda to go to Chicago, get Larry, and return to Decatur to care for him on a temporary basis. Immediately upon Sharon's release, after delivery, Sharon entered a resident drug rehabilitation center in Chicago for about 3 weeks. Upon discharge from the drug rehabilitation center, Sharon came to Decatur and lived

in the home of Gene and Glenda, with Larry, for about 3 weeks. On or before April 20, 1986, Sharon returned to the drug environment in Chicago where she was living prior to Larry's birth. During the month of April, 1986, Sharon started dating Jill Lewandowski (hereinafter referred to as Jill) and they rented the apartment, in which they now live in a lesbian relationship.

Furthermore, Sharon testified that after she and Jill moved into the apartment, she told Gene that she wanted to take Larry back to Chicago, but that Gene said she did not have the physical, emotional, and financial stability to assume the responsibilities of motherhood at that time. Although Gene and Glenda testified that Sharon acceeded to the instabilities, Sharon testified that she was afraid of her father and that he has a dominant personality. In this regard,

it is interesting to note that other members of the family testified that Sharon and Gene are obstinate, dynamic, and manipulative but charming. In any event, the Court finds that Sharon is a diabetic, that she experienced a number of blackouts, that she attended Alcohol and Drug Anonymous meetings, and that she filed bankruptcy between the time that Larry was born and the time the Petition was filed herein.

The Court further finds that Gene Brown is now 63 years old; his second wife, Glenda, is 41 years old. Gene and Sharon's mother were married for more than 30 years; they had 3 children; 2 of the 3 children are homosexuals; the third, Kathleen, is, at least prima facie, the most desirable person to be named as Larry's guardian. Notwithstanding, the Court also finds that Gene owns and operates his own independent agency

in Decatur at the present time, after having worked in the insurance industry for more than 30 years. During those years, Gene drank excessively, was verbally (but not physically) abusive to Sharon's mother, and spent very little time with his children. Sharon's mother pretty much raised the children as a married single if not a single parent. The stress and anxieties experienced by Sharon's mother when combined with Gene's dominant personality and consumption of alcohol led to arguments and eventually a divorce. However, the relationship between Gene and his first wife appeared to be civil during these proceedings.

Further, Gene and Glenda, as well as other members of the family, testified that Gene and Glenda have a stable and loving relationship and drink very little alcohol at the present time. Ron Allen, Pastor of The First Presbyterian Church

of Decatur, was called by Gene and Glenda and testified that he officiated their wedding and that they have a good marriage.

Dr. Michael A. Campion, Ph.D. (in Psychology), was called by Gene and Glenda and testified that the physical environment of the home of Gene and Glenda was satisfactory. Lanell Hill, Social Work Supervisor for Lutheran Child and Family Services of Illinois, was called by Sharon, and testified that the physical environment of Sharon's apartment was satisfactory.

Dr. Campion, also, testified that "bonding" has occurred between Gene and Glenda and Larry, and that it would be traumatic to change custody of Larry from Gene and Glenda to Sharon, at this time, for a number of reasons, including, but not limited to Sharon's diabetic condition, Sharon's unstable environment

arising out of her lesbian relationship with an increased probability of sexually-transmitted diseases and the enhanced probability that Sharon would return to drug and alcohol abuse. Incidentally, Dr. Campion did not have a personal consultation with Sharon.

Dr. Thomas E. Radecki (Psychiatrist) was appointed by the Court to examine Sharon and testified that the probability that Sharon would resume alcohol and drug abuse was greater than it is for a person who has not used alcohol or drugs. On the other hand, Dr. Radecki testified, in summary, that Sharon has a strong maternal attachment for her son, that she would be able to provide a very good home for him, that she would be able to provide a stable and positive environment, that her diabetic problems would not interfere with her raising her son, that Sharon's homosexual

relationship would not have an adverse effect on the child, and that Sharon's participation in the Alcohol and Drug Anonymous activities are a positive sign of stability. Dr. Radecki further testified that he thought Sharon was gay when he first saw her, that she looks like a gay person, and that she still has some hostility toward the rapist (Larry's putative father). Although Dr. Radecki testified that a child raised by a Lesbian would not experience psychological problems, Dr. Radecki did not differentiate between a lesbian relationship that was private and discreet and a relationship that was open and notorious with or without continuous cohabitation. Moreover, he did not differentiate between or among those Lesbian mothers who are raped or who become pregnant voluntarily within or outside the bonds of matrimony or who

are, in fact, bisexual. Furthermore, he did not differentiate between children who live in a lesbian environment throughout their lives from those who live in a heterosexual environment for a part of their lives and a homosexual environment during another part of their lives. In this regard, the discussion found in the Family Law Quarterly as published by the American Bar Association, Section of Family Law in Vol. 22, No. 1, Spring, 1988, in an article entitled "Custody Determination Involving the Homosexual Parent" authored by Robert A. Beargie, cited and filed herein by the Guardian Ad Litem, Attorney Mark Gibson, is informative.

Although Sharon's sister testified that Sharon was involved in a heterosexual relationship some 10 years ago, Sharon told the Court that she was not familiar with the studies of Masters

and Johnson indicating that a change from homosexuality to heterosexuality was possible. Further, Sharon intimated to the Court that she was happy as a homosexual and was not interested in the possibility of becoming a heterosexual. Furthermore, although Sharon testified that she would send Larry to a Catholic school, she indicated that the last church service she attended was Christmas, 1986. Furthermore, she testified that God loved her and made her what she is but that she could not understand why the Pope would not accept her as she is.

Supreme Court Justice Robert C. Underwood discussed cohabitation of a custodial parent with a member of the opposite sex, the standards of conduct under the Illinois Marriage and Dissolution Act (Ill. Rev. Stat. 1977, Ch. 40, Par. 101 et seq.) and the best

interest of a child under these circumstances in the case of Jarrett v. Jarrett, 78 Ill.2d 337, as follows:

> In April, 1977, five months after the divorce, Jacqueline informed Walter that she planned to have her boyfriend, Wayne Hammon, move into the family home with her. Walter protested, but Hammon moved in on May 1, 1977. Jacqueline and Hammon thereafter cohabited in the Jarrett home but did not marry.
>
> The children, who were not "overly enthused" when they first learned that Hammon would move into the family home with them, asked Jacqueline if she intended to marry Hammon, but Jacqueline responded that she did not know. At the modification hearing Jacqueline testified that she did not want to remarry because it was too soon after her divorce; because she did not believe that a marriage license makes a relationship; and because the divorce decree required her to sell the family home within six months after remarriage. She did not want to sell the house because the children did not want to move and she could not afford to do so. Jacqueline explained to the children that some people thought it was wrong for an unmarried man and woman to live together but she thought

that what mattered was that they loved each other. Jacqueline testified that she told some neighbors that Hammon would move in with her but that she had not received any adverse comments. Jacqueline further testified that the children seemed to develop an affectionate relationship with Hammon, who played with them, helped them with their homework, and verbally disciplined them. Both Jacqueline and Hammon testified at the hearing that they did not at that time have any plans to marry. In oral argument before this court Jacqueline's counsel conceded that she and Hammon were still living together unmarried. (Pages 341, 342)

The chief issue in this case is whether a change of custody predicated upon the open and continuing cohabitation of the custodial parent with a member of the opposite sex is contrary to the manifest weight of the evidence in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children. Considering the principles previously enunciated, and the statutory provisions, and prior decisions of the courts of this State, we conclude that under the facts in this case the trial court properly transferred custody of the Jarrett children from Jacqueline to Walter Jarrett.

The relevant standards of conduct are expressed in the statutes of this State: Section 11-8 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, Ch. 38, Par. 11-8) provides that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." In Hewitt v. Hewitt (1979), 77 Ill.2d 49, 61-62, we emphasized the refusal of the General Assembly in enacting the new Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, Ch. 40, Par. 101 et seq.) to sanction any nonmarital relationships and its declaration of the purpose to "strengthen and preserve the integrity of marriage and safeguard family relationships" (Ill. Rev. Stat. 1977, Ch. 40, Par. 102(2)).

Jacqueline argues, however, that her conduct does not affront public morality because such conduct is now widely accepted, and cites 1978 Census Bureau statistics that show 1.1 million households composed of an unmarried man and woman, close to a quarter of which also include at least one child. This is essentially the same argument we rejected last term in Hewitt v. Hewitt (1979), 77 Ill.2d 49, and it is equally unpersuasive here. The number of people living in such households forms only a small

percentage of the adult population, but more to the point, the statutory interpretation urged upon us by Jacqueline simply nullifies the fornication statute. The logical conclusion of her argument is that the statutory prohibitions are void as to those who believe the proscribed acts are not immoral, or, for one reason or another, need not be heeded. So stated, of course, the argument defeats itself. The rules which our society enacts for the governance of its members are not limited to those who agree with those rules--they are equally binding on the dissenters. The fornication statute and the Illinois Marriage and Dissolution of Marriage Act evidence the relevant moral standards of this State, as declared by our legislature. The open and notorious limitation on the former's prohibitions reflects both a disinclination to criminalize purely private relationships and a recognition that open fornication represents a graver threat to public morality than private violations. Conduct of that nature, when it is open, not only violates the statutorily expressed moral standards of the State, but also encourages others to violate those standards, and debases public morality. While we agree that the statute does not penalize

> conduct which is essentially private and discreet (People v. Cessna (1976), 42 Ill.App.3d 746, 749), Jacqueline's conduct has been neither, for she has discussed this relationship and her rationalization of it with at least her children, her former husband and her neighbors. It is, in our judgment, clear that her conduct offends prevailing public policy. Lyman v. People (1902), 198 Ill. 544, 549-50; Searls v. People (1852), 13 Ill. 597, 598; People v. Potter (1943), 319 Ill.App. 409, 410-11, 416.
>
> Jacqueline's disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore them (see Stark v. Stark (1973), 13 Ill.App.3d 35; Brown v. Brown (1977), 218 Va. 196, 237 S.E.2d 89), and could well encourage the children to engage in similar activity in the future. That factor, of course, supports the trial court's conclusion that their daily presence in that environment was injurious to the moral well-being and development of the children. (Pages 345, 346, 347)

Further, Ann Elizabeth Shiel Daly was called by Sharon and indicated that "... diabetes should not stand in the way of Sharon Brown to be a fit parent."

(Evidence Deposition dated January 9, 1988, Lines 4 and 5 at Page 56) and "...it is safer to have another adult present than for this individual to live alone with a very young child, provided that adult has the proper knowledge" (Evidence Deposition dated January 9, 1988, Lines 21-23, Page 57). In addition, although Sharon's treating physician, Gerald W. Wiesberg, M.D., indicated that Sharon has her diabetes under control, he, also, indicated that it is medically advisable for Sharon to live with someone to carry out the action that is required when Sharon has a hypoglycemia attack. The person that Sharon is living with in a lesbian relationship is aware of Sharon's condition and has administered glucagon to Sharon with orange juice. Jill was called by Sharon and testified that she and Sharon were lovers, that they share

household expenses, and that "gay" publications are present and open to view in their apartment. Jill further testified that she is not and would not be with Sharon 100 percent of the time.

Further, Sharon testified that her income is insufficient to maintain the present apartment and standard of living without Jill's contribution.

Notwithstanding, Sharon testified that she loved her son, wanted custody of her son, that she was physically, financially, and emotionally capable of assuming the responsibilities of custody.

Furthermore, where a person who is not a parent seeks custody under either the Probate Act or the Illinois Marriage and Dissolution Act, that person must sustain the burden set forth in In Re Custody of Townsend and the facts to be considered by the trial court were set forth in the case of Montgomery v. Roudez, 156

Ill.App.3d 262, First District (3rd Division), Opinion filed May 13, 1987, as follows:

> ....(1) the wishes of the child's parent as to his custody, (2) the sufficiency and stability of the respective parties' homes and surroundings (see In Re Estate of Becton (1985), 130 Ill.App.3d 763, 769, 474 N.E.2d 1318, 1324), (3) the interaction and interrelationship of the child to his parent and to any other person who may significantly affect the child's best interest, (4) the child's adjustment to his home, and (5) the mental and physical health of the individuals involved. (Page 267)
>
> The evidence also indicates that plaintiff has failed to demonstrate any continuous pattern of maturity or stability ... or an ability to deal independently with responsibility, personal finances, social problems, or parenting. (Page 268)
>
> ....sufficient maturation to act as a complete and full-time parent. (Page 268)
>
> ....a stable physical and emotional environment.... (Page 268)
>
> Additionally, we find no error in the trial court's

> consideration of the relative economic postures of the parties. While mere financial disparity is insufficient to deprive a natural parent of the custody of her child, the right of a parent to care for her child is associated with concomitant responsibilities.... Therefore, the economic positions of the parties are a factor that must be considered in determining the best interests of the child, especially where one party has no visible means of support. (Page 268)

In the instant case, after taking into consideration the totality of evidence summarized above as well as the law set forth above, the Court holds that it is in the best interest of the minor, Laurence T. Brown, to grant the prayer of the Petition and place him in the custody of Gene and Glenda Brown. In addition, taking into consideration the income and expense information submitted by Sharon, it is the order of this Court that Sharon pay as and for partial child support $10.00 per week commencing Friday,

January 6, 1989, and a like amount each and every week thereafter until further order of Court. In this regard the Court holds that Sharon's expenses are extra-ordinary but reasonable and that the statutory support guidelines should not be followed. All payments are to be made to the Circuit Clerk who is ordered and directed to forward the payments received to the Guardians, Gene and Glenda Brown.

In addition, Sharon M. Brown is granted reasonable visitation as defined by this Court October 7, 1987 except that Sharon is to have 2 weeks of visitation in June or such other 2-week period as the parties hereto agree. Further, the summer visitation is to be increased to 4 weeks when Larry attains the age of 7 years. When Sharon exercises visitation, an adult must be present with Sharon and Larry who can care for Sharon in the event she has a hypoglycemia attack,

until such attacks are highly unlikely.

Copy of this Memorandum of Decision to be mailed to the attorneys of record. Written Order to be filed.

Dated this 30th day of November, 1988.

W. A. Sappington
Associate Circuit
Judge

Probate
Judge W. A. Sappington
November 30, 1988 (lkm)

86-P-291 LAURENCE T. BROWN, Minor

In regard to "Petitioner's Motion to Strike Certain Portions of Respondent's Brief" filed herein July 8, 1988, cause removed from advisement as follows:

Paragraphs 1 and 2 were admitted by Respondent and, therefore are stricken;

Paragraph 3, denied;

Paragraph 4, granted;

Paragraph 5, granted.

In regard to Points I and II set forth in "Petitioner's Reply Argument and Brief" filed herein July 8, 1988, that "I. Respondent has waived her claim that Section 11-7 of the Probate Act is unconstitutional" in that she failed to comply with the requirements of Supreme Court Rule 19, the Court holds although the purported compliance with Supreme Court Rule was somewhat "cavalier",

Respondent did not waive her claim that Section 11-7 of the Probate Act is unconstitutional. Further, with respect to Petitioner's "II. Section 11-7 of the Probate Act is constitutional" in response to Respondent's Brief paragraph "1. Chapter 110 1/2, Paragraph 11-7, in that it permits the awarding of the custody and education of a minor to either parent or some other person solely in the situation where the parents live apart, is unconstitutional," this Court holds that Section 11-7 of the Probate Act is constitutional. See, by analogy, Montgomery v. Roudez, 156 Ill.App.3d 262, Para. 8 and 9, at Pages 268 and 269.

Copies of this entry to be mailed to counsel of record.

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Dear Counsel:

A copy of the Memorandum of Decision that I intend to sign and file Monday, December 5, 1988 is enclosed for your information. You and your associates and staff, as well as your clients, are ordered and directed NOT to disclose the contents of this unsigned Memorandum of Decision to <u>anyone</u> (other than the

parties and lawyers of record) before 9:00 O'Clock a.m., Monday, December 5, 1988.

Very truly yours,

W. A. Sappington

WAS/sr

Enclosure